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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests	)	MM Docket No. 94-150
	)	
Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry	)	MM Docket No. 92-51
	)	
Reexamination of the Commissioner's Cross-Interest Policy	)	MM Docket No. 87-154

PETITION FOR RECONSIDERATION
of UCC *et al.*

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October 18, 1999

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SUMMARY

UCC *et al.* urge the Commission to reconsider in part its decision regarding the attribution rules for broadcast interests. The Commission should revise the rules to be consistent with the public interest. Although the Commission's reform of the attribution rules is a step in the right direction, it falls several paces short of the ultimate goal. The attribution rules are the bedrock upon which the broadcast ownership rules are built. Without precise attribution rules that identify ownership interests that may influence or control the programming and other core operations of a licensee, the ownership rules are rendered meaningless. In light of the current unprecedented concentration of the broadcast media, the dearth of small or disadvantaged businesses in the broadcast industries, and the recent relaxation of the broadcast ownership regulations, there is a great need, now more than ever before, for strong and accurate attribution rules.

UCC *et al.* therefore ask that the Commission to reconsider its revision of the broadcast attribution rules and go several steps further. First, the Commission should adopt a system that identifies <u>any</u> relationship that permits an entity to exert significant influence or control over the programming, management or budgetary decisions of a licensee. Far too much is left uncounted under the present regime. This failure is illustrated by the recent deal between NBC and Paxson Communications. Second, the Commission should retain the cross-interest policy because it is still needed to fill the many gaps left by the present attribution criteria. Finally, the Commission should clarify that local marketing agreements ("LMA") are an illegal artifice of control of another station as of August 6, 1999. LMAs have been, and always will be, contrary to the

public interest and any rationale for allowing these questionable combinations in the past has been eliminated with the repeal of the duopoly rule.

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To: The Commission

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Pursuant to Section 1.429 of the Commission's Rules, the Office of Communication, Inc. of United Church of Christ, Black Citizens for a Fair Media, Center for Media Education, Civil Rights Forum, League of United Latin American Citizens, Philadelphia Lesbian and Gay Task Force, Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights, Wider Opportunities for Women, and the Women's Institute for Freedom of the Press ("UCC *et al.*"), by their attorneys, the Institute for Public Representation ("IPR") and the Media Access Project ("MAP"), respectfully ask the Commission to reconsider and clarify in part its decision to revise the broadcast attribution rules and the cross-interest policy in *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investments in the Broadcast Industry;*

Reexamination of the Commission's Cross-interest Policy; Report and Order, FCC 99-207 (rel. August 6, 1999) ("*Attribution Order*").

UCC *et al.* collectively represent a broad spectrum of the listening public. As such, they have a strong interest in ensuring a diversity of sources of information about important local public issues. UCC *et al.* urge the Commission to reconsider in part its decision to revise the attribution rules for broadcast interests to be consistent with the public interest. Although the Commission's reform of the attribution rules is a step in the right direction, it falls short of the ultimate goal. The attribution rules are the bedrock upon which the broadcast ownership rules are built. Without precise attribution rules that identify ownership interests that may influence or control the programming and other core operations of a licensee, the ownership rules will become meaningless.

There is a great need for strong and accurate attribution rules. The mass media landscape is experiencing a period of unprecedented massive corporate concentration.[1] Minority ownership of broadcast stations has remained dismal and in some respects has worsened in recent years.[2]

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[1] The most recent examples of this disturbing trend are the acquisition of CBS by Viacom and Clear Channels' buy out of AMFM. *See* Steve McClellan, *et al.*, *The Melding of Viacom, CBS. - Viacom Inc. takes over CBS Corp.*, BROADCASTING AND CABLE, Sept. 13. 1999, at 14; *See* Elizabeth A Rathbun, *Count'em 830 - Merged Clear Channel/AMFM Blankets U.S. with Hundreds of Radio Stations*, BROADCASTING AND CABLE, Oct.11, 1999, at 12.

[2] *See, e.g.* NTIA, *Minority Commercial Broadcast Ownership 1997-1998,* (visited Oct. 15, 1999) <http://www.ntia.doc.gov/opadhome/oldminown98/overu98.htm>. According to the report, as of August 1998, 160 minority broadcasters owned 337 of 11,524 commercial radio and television stations in the United States. Minority commercial broadcast ownership showed a negligible increase of .1%, from 2.8% in 1997 to 2.9% this year, a net gain of 15 stations. But even though minorities registered an increase in ownership of 15 stations, NTIA found that the *industry continues to lose minority owners, losing 23 owners in 1997-1998 alone.* Given the high prices of commercial television stations, the report concludes that those owners that were

Moreover, the Commission's recent decision to significantly relax the broadcast ownership regulations will make it more difficult for new entrants and will diminish the number and variety of voices available to the viewing/listening public. *See Review of the Commission's Regulations Governing Television Broadcasting, Report and Order,* FCC 99-209 (rel. August 6, 1999) ("*Local Broadcast Ownership Order*"). All these factors underscore the need to apply the attribution rules "with the greatest precision to entities that have the power to influence a licensee's operations." *See id.* at ¶ 35.

Thus, UCC *et al.* ask that the Commission reconsider its broadcast attribution rules. First, the Commission should adopt rules that identify <u>any</u> relationship that permits an entity to exert significant influence or control over the programming or management decisions of a licensee. Second, the Commission should retain the cross-interest policy because it is still needed to fill the many gaps left by the present attribution criteria. Finally, the Commission should clarify that local marketing agreements ("LMA") are an illegal artifice of control of another station as of August 6, 1999. LMAs contravene the public interest and any rationale for allowing these questionable combinations in the past has been elimintaed with the repeal of the duopoly rule.

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lost are unlikely to be replaced by new minority entrants.

I. THE COMMISSION SHOULD MODIFY ITS ATTRIBUTION RULES TO COUNT ALL OWNERSHIP INTERESTS THAT MAY INFLUENCE OR CONTROL THE PROGRAMMING OR MANAGEMENT OF A LICENSEE

The purpose of the attribution rules is to identify those "interests in or relationships to licensees that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions." *See Attribution Order* at ¶ 1. Although the Commission's new attribution rules are a step in this commendable direction, they do not go far enough.

For example, the Commission's new Equity-Debt Plus ("EDP") rule purports to increase the precision of the attribution rules, and in theory, it does reach certain relationships that were not attributable in the past that should have been. However, the EDP rule also leaves gaping holes through which parties may continue to manipulate the broadcast ownership rules and persist in non-attributable relationships that have every indicia of influence over the licensee. The Commission should modify its attribution rules to fill the gaps left by the EDP rule. Generally, the Commission should recognize all ownership interests in a licensee that engender a significant influence in the programming decisions or management functions of the licensee. In addition, the Commission should eliminate the single majority shareholder exemption because there is no rationale explanation for removing the single majority exemption in the cable context and not in broadcast and the exemption allows influential interests in licensees to remain non-attributable.

A. The Current EDP Rule Frustrates the Purpose of the Attribution Rules By Failing to Identify Interests that Exert Significant Influence or Control over a Licensee.

One of the paramount goals of the *Attribution Order* was to restructure the attribution rules to ameliorate the shortcomings of the prior scheme, particularly the ability of entities with substantial interests in a licensee to exert significant influence over a licensee and escape attribution. *See Attribution Order* at ¶ 26. The Commission devised the EDP rule as one of the vehicles to address this concern. *See id* at ¶ 27. The EDP rule "would attempt to increase the precision of the attribution rules, address our concerns about multiple nonattributable relationships, and respond to concerns about whether the single majority shareholder and nonvoting stock attribution exemptions were too broad." *See id.* In light of the relaxation of the multiple ownership limits, the Commission made clear that it must apply its attribution rules "with the greatest precision to entities that have the power to influence a licensee's operations." *See id.* at ¶ 35.

However, the EDP rule fails to accomplish these goals. It frustrates the very purpose of the attribution rules by allowing investors with substantial influential interests and control in a licensee to evade attribution and thereby circumvent the ownership rules. Under the adopted EDP rule, an investor's interest in a licensee or other media entity is attributable when the investor's interest in the licensee, aggregating debt and equity interests, exceeds 33% of the total asset value of the licensee and the investor is either 1) a "major program supplier" that supplies over 15% of a station's total weekly broadcasting programming hours, or 2) a same-market media entity subject to the broadcast multiple ownership rules. *Id.* at ¶ 36.

The EDP rule invites manipulation. Under the rule, an entity could easily structure an arrangement to evade application of the rule while retaining a substantial amount of influence or control in the licensee. For example, by simply acquiring a somewhat less than 33% interest in the licensee the interest would arguably still be non-attributable under the EDP rule, irrespective of how much control the investor would actually retain over the licensee, through contractual obligations, options or outright involvement in core operations,

The above example is unfortunately not a hypothetical. In fact, it is taken straight from today's headlines. On September 17, 1999, NBC invested $415 million in Paxson Communications Corp., acquiring 32.2% of Paxson common stock. *See NBC-Paxson $415 Million Deal Designed to Avoid FCC,* COMM DAILY, Sept. 19, 1999, at 1. Paxson owns 72 television stations covering 76% of the United States and has 51 affiliates.[3] *See* Steve McClellan, *Peacock takes Piece of Pax,* BROADCASTING AND CABLE, Sept. 20,1999, at 6. Paxson's cable and broadcast networks are NBC's "long sought second path of distribution for entertainment programming." *NBC-Paxson $415 Million Deal Designed to Avoid FCC,* COMM DAILY, Sept.19, 1999, at 1. Under this agreement, NBC and Paxson will craft new programming for both networks and Paxson stations will air NBC programming. *Id.* In addition, NBC will play a major role in Paxson's budget and has the right to approve all shows exceeding five hours per season that are developed for the Pax network and NBC-Paxson shared market stations. *See* Steve Mclellan, *The Peacocking of Pax,* BROADCASTING AND CABLE, Oct. 11,1999, at 68. According to the SEC filing, NBC has a right of first refusal in the sale of any Paxson station and

[3] Because of the UHF discount Paxson's national audience reach is 34% under the FCC rules.

can require a Paxson station to carry any program preempted by an NBC affiliate in the same market. *See NBC-Paxson $415 Million Deal Designed to Avoid FCC,* COMM DAILY, Sept.19, 1999, at 1. NBC will appoint 3 directors to the Paxson board. *See id.* Finally, under the terms of the deal, should the Commission raise its national ownership limits to 50%, NBC reserves the right to acquire total control of Paxson. *See* Steve Mclellan, *The Peacocking of Pax,* BROADCASTING AND CABLE, Oct.11, 1999, at 68.

And in spite of all this, NBC's interest in Paxson is arguably not attributable because the investment is 0.8% under the EDP limit of 33%. This absurd result is exactly the type of "gaming" the Commission sought to avoid in its restructuring of the attribution rules. *See Separate Statement of Commissioner Susan Ness, Attribution Order* at 101.[4] In fact, NBC executives admitted that the network's investment in Paxson "was designed to avoid reviews by the FCC and the Department of Justice." *NBC-Paxson $415 Million Deal Designed to Avoid FCC,* COMM DAILY, Sept. 19, 1999, at 1. It is abundantly clear that NBC has substantial control over Paxson's programming and significant influence over the management of Paxson's business activities. In the words of Jeff Sagansky, president and CEO of Paxson, "we've really accepted an equal partner, even though they own 32%." Steve Mclellan, *The Peacocking of Pax,*

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[4] In the past, the Commission has not looked too kindly on entities that mask their control of a licensee. For example, the Commission has previously denied applicants broadcast licenses on the ground that the applicant was not truthful in its disclosure of the corporate structure and manner of control over the prospective station. *See, e.g.* In re App. of Evansville Skywave, Inc., MM Docket No. 88-403, 6 F.C.C. R. 1356 (1991) (Corporate applicant's claim that an individual owning 100% of corporation's stock was untrue in light of fact that agreement provides for control to convert to corporation after license is granted and corporation was formed solely to pursue the broadcast license.).

BROADCASTING AND CABLE, Oct.11, 1999, at 68. According to Broadcasting and Cable, "Paxson has to get NBC's approval for just about every move it makes of any consequence." *Id.*

In sum, the NBC-Paxson deal makes a mockery of the new attribution rules. If the Paxson stations were attributable to NBC it would be in clear violation of the 35% national ownership limits. However, since NBC's interest is arguably not attributable because the agreement limited the investment to 32.2% of Paxson's assets instead of 33%, NBC completely skirts the ownership cap issue.

NBC-Paxson may not be the only ones manipulating the new attribution rules. There is speculation that Viacom may reduce its stake in the UPN network to 32% in order to escape attribution. *See CBS Affiliates Taking 'Wait-and-see' Stance on Viacom Deal,* COMM DAILY, Sept.13,1999, at 1. Evading attribution of the UPN network will enable Viacom to bypass the Commission's proscription against one entity owning two television broadcast networks. If one major national business transaction can openly flaunt the new rules, and another can seriously consider following suit, one can only wonder what is happening in the smaller markets with the smaller, less publicized deals. Any broadcaster could purchase 32% of another licensee in a neighboring designated market area ("DMA") and supply all of its programming and arguably none of the interest would be attributable. Or a broadcaster could set up a local marketing agreement ("LMA") with another licensee in a neighboring market and provide the majority of the LMA'ed station's content. But since the LMA'ing broadcaster has not "invested" a dime, there is arguably no attribution. The EDP rule simply does not go far enough to cover relationships that confer a significant amount of influence over the licensee. Thus, the Commission must restructure the attribution framework to address the flaws of the EDP rule.

B. The Attribution Rules Should Identify Any Significant Influence or Control an Investor may have in the Programming or Management Decisions of the Licensee.

The Commission should reconfigure its attribution scheme to focus on indicia of substantial control or influence over the licensee. *See Separate Statement of Commissioner Gloria Tristani, Attribution Order* at 111 (arguing that "[t]he attribution rules . . . should identify *any* relationship that permits an entity to exert significant influence over another")(emphasis in original). When determining whether an entity has *de facto* control of a licensee, the Commission and the courts have generally looked at whether the entity has ultimate control over a licensee's programming, the finances of the station, and the station's personnel policies. *See Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981). Similarly, when concluding what constitutes an influential interest in a licensee, the Commission has focused on interests that convey a realistic potential to affect a licensee's programing and other core potential decisions. *See Attribution Order* at ¶ 1.

Accordingly, the Commission should redouble its efforts to seek to identify with reliable accuracy those interests that convey to their holder "any realistic potential to affect the programming decisions of licensees or other core operating functions." *See Attribution Order* at ¶ 1. UCC, *et al.* suggest an approach similar to that recommended by the National Telecommunications and Information Administration (NTIA) and Viacom Inc. in their initial comments. *See* Letter from Larry Irving, *NTIA,* to Reed E. Hundt, Chairman, *Federal Communications Commission* (May 27, 1997); *See also* Comments of Viacom, Inc., *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, MM Docket No. 94-150 at 7 (Filed Feb. 7 1997). The Commission should look to at least the three following factors to determine if an investor's interest in a licensee should be attributed: 1) participation in the selection of programming of the licensee; 2) influence in the hiring of station personnel who make programming or core management decisions; and 3) substantial control over the licensee's budget.[5]

In determining whether an entity's interest is attributable, the Commission should first determine whether the interest or interests in question fall under any of the revised rules - namely the 5% voting stock, 20% passive stock, and the EDP rules. If the Commission concludes that none of the rules apply, the Commission should then determine to what degree the investor *could* exert influence or control over the licensee in *any* of the three enumerated categories - programming, management or budget. If the Commission determines that the investor could exert such influence or control, then the Commission should *presume* the interest attributable.[6]

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[5] The Department of Justice (DOJ) recommended a similar approach, suggesting that the Commission retain the flexibility to address other relationships that confer significant control and influence over the licensee other than those that may fall under the EDP rule. *See* Letter from Joel I. Klein, Acting Assistant Attorney General, Antitrust Division, *DOJ*, to Reed E. Hundt, Chairman, *Federal Communications Commission* (May 7, 1997) (DOJ Letter).

[6] Other Federal agencies, notably the Office of the Comptroller of the Currency (OCC) and the Office of Thrift Supervision (OTS), have acknowledged investors' ability to *potentially* control an entity by crafting both conclusive and rebuttable presumptions of control. While conclusive presumptions of control focus on whether a certain level of stock ownership has been obtained by the investing or acquiring company, rebuttable presumptions of control focus on whether the investing or acquiring company has the ability to exert a continuing influence on a "material aspect" of the operations of the entity in question. These rebuttable control presumptions decrease the likelihood of potential investors skirting agency control guidelines by merely decreasing their level of stock ownership to below that set as indicating conclusive control. *See, e.g.*, 12 C.F.R. § 574.4.

The burden would then fall upon the entity to rebut the presumption of attribution.[7] One possible means of rebutting the presumption could be the language of the agreement between the investor and the licensee. A contract that by its terms, supported by an affidavit, isolates the investor rendering his or her influence in all of the above three categories *de minimus,* could rebut the presumption of attribution.

C. The Commission Should Repeal the Single Majority Shareholder Exemption Because it Allows for Investors to Exercise Significant Control or Influence over a Licensee.

Another important step that the Commission could take to make attribution rules more precise would be to repeal its exemption for single majority shareholders. The Commission created the single majority shareholder exemption to avoid penalizing certain types of non-influential investors in a licensee. *See Review of Commission's Regulations Governing Attribution of Broadcast Interests, Notice of Proposed Rulemaking,* 10 FCC Rcd 3606, 3610 (1995). Essentially the single majority shareholder scheme exempts from attribution those who hold equity interests in broadcast stations where there is another entity that controls over 50% of the voting stock. *Id.* However, after having reexamined its objectives in the *Attribution Order,* the Commission decided to revise this exemption because of "concerns raised that certain non-

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[7] UCC *et al.* acknowledge that this recommendation may require an *ad hoc*, fact based analysis. However, considering the significant relaxation of the broadcast ownership rules and the current paucity of small or disadvantaged businesses in the media landscape, it is more important now more than ever before that the Commission ensure that interests in licensees meriting attribution are in fact attributed. With this in mind, it is a small task to ask that the Commission should engage in the occasional case-by-case attribution analysis in order to ensure that yet another entity is not skirting the ownership rules. Moreover, as demonstrated by the adoption of a similar approach by other federal agencies - OCC and OTS - with similar objectives of identifying actual control of another entity, *ad hoc* application of indicia of control principles will not "freeze" investments into the broadcast industry.

attributable investments, while permissible under current rules, might permit a degree of influence that warrants their attribution." *Id.* at ¶ 2. Thus, the Commission adopted the EDP rule to limit the expanse of the single majority shareholder exemption. *See Attribution Order* at ¶ 36.

However, the Commission went further in limiting the exemption in its recent cable attribution order. *See FCC Revises Cable Horizontal and Attribution Rules, Press Release, Oct. 8 1999* (*Cable Order*). In the *Cable Order*, the Commission repealed the single majority shareholder exemption for its cable attribution rules notwithstanding the adoption of a similar EDP rule. *See id.* The purpose of the cable attribution rules and the broadcast attribution rules are the same - "to identify . . . relationships that confer on their holders a degree of ownership or other economic interest, or influence or control over an entity engaged in the provision of communications services such that the holder should be subject to the Commission's regulations." *See id.* There is no rational explanation for removing the single majority exemption in the cable context and not in broadcast. Thus, for the reasons the Commission repealed the single majority exemption for its cable attribution rules, it should do away with the exemption for the purposes of the broadcast attribution rules.

Moreover, practically speaking the single majority shareholder exemption still allows numerous possibilities for entities and individuals to acquire controlling and influential interests in broadcast stations without having their interests attributed. Under the adopted regime, so long as there remains a single majority shareholder with 51% of the licensee's assets, an investor's interest will not be attributed if she can structure the investment to avoid the EDP rule. As demonstrated above in Part I.A., this is not especially difficult to do. Allowing for such a situation ignores the realities of the modern investment and finance markets where investors, lenders and financiers with a relatively small equity or debt stake in a company, often condition their financing on having a degree of operational control.

In sum, the Commission should reconsider its attribution rules and make them consistent with the public interest by ensuring their accuracy in identifying any significant influence or control an entity may have in the programming, management or budgetary decisions of a licensee. In addition, the Commission should repeal the single majority shareholder exemption for the broadcast attribution rules because it is arbitrary and capricious to eliminate the exemption in cable while retaining it for broadcast and because it frustrates the purposes of the attribution rules by allowing influential interests to continue being non-attributable.

II. THE COMMISSION SHOULD RECONSIDER ITS DECISION TO ELIMINATE THE CROSS-INTEREST RULES

UCC *et al.* seek reconsideration of the Commission's short-sighted decision to jettison cross-interest rules which have long served the public interest. *Attribution Order* at ¶¶ 100-116. Aspects of the cross-interest policy left in place by the Commission in 1989 have continued to serve a useful purpose in preventing harm to the competition and free enterprise which benefit citizens and consumers. UCC *et al.* urge the Commission to reconsider and reverse its decision to abolish this valuable policy. It should, at the least, require a notice provision that would enable the FCC and the public to know of questionable relationships so that they might be pursued even if only under a general public interest test.[8]

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[8] Absent adequate information, the Commission's assurance that it will always review transactions under its general public interest authority, *see Attribution Order* at ¶116, is a hollow promise. Nor does the general public interest review deal with abuses of incumbent licensees.

A. The Cross-Interest Policy Continues to Serve the Public Interest

The cross-interest policy addresses the reality that there are arrangements and relationships short of attributable ownership which can enable individuals to abuse their broadcast licenses. Of these, the most important may be the key employee rule, which addresses employees of one licensee who may have interests in a different licensee. There is no other FCC provision that precludes the owner of six or seven radio stations in a market from also serving as the group manager or program director for an equal number of stations in the same market owned by another, supposedly competitive, licensee. And, of course, licensees could be controlled by a family member or business associate, so long as there were no other common interests attributable under FCC rules.

It bears particular emphasis that the Commission's discussion of the cross-interest policy is entirely framed in references that are applicable, if at all, to large markets. The greatest dangers that the cross-interest policy addresses are likely to arise in small and medium-sized markets, where a small, closely inter-related business environment lends itself to the kinds of arrangements prohibited under the cross-interest policy. In the context of a small community, a school board or city council election may be dramatically impacted by the editorial policies and news coverage of these close knit relationships that encompass virtually every broadcast station in the market. Even if repeal were defensible in larger markets, the Commission has failed to explain why the policy should not be retained for smaller communities.

The Commission would rely on the remaining ownership and attribution rules to prevent development of anti-competitive relationships, without acknowledging those rules, too, have been repealed or weakened. *See Attribution Order* at ¶113. The Commission apparently believes that the newly-created EDP rule constitutes a sufficient stand-in for cross-interest safeguards, while at the same time admitting that the EDP rule cannot reach all the arrangements covered by the cross-interest policy. *See Attribution Order* at ¶114.

The Commission's desire to usher in a new era of regulatory certainty, *see, e.g., id.* at ¶112, impels it to conclude that since the cross-interest policy is inherently *ad hoc,* then the policy is by definition unclear.[9] This position is as untenable as the decision to repeal the policy. Moreover, the Commission's decision nowhere considers its impact on diversity. In light of the recent consolidation of the broadcasting and cable markets,[10] the Commission makes a grave error by removing a policy designed to address practices which tend to entrench the *status quo*.

B. Other Ownership and Attribution Rules Do Not Substitute for the Cross-Interest Policy

The Commission defends its action on the basis that "many remaining aspects of the cross-interest policy are subsumed under our attribution rules, as revised herein." *Id.* at ¶116. It is true that the EDP rule covers some of the concerns treated under the non-attributable interests prong of the cross-interest policy. *See Id.* at ¶114. However, as demonstrated above in Part I.A, the EDP rule cannot be trusted to accurately identify all the interests in a licensee that should be attributed. It is no justification to eliminate the cross-interest policy and the myriad interests it identified by replacing it with a mechanism that will largely ignore the concerns the cross-interest policy addressed.

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[9] The Commission notes that it invited comment on whether the cross-interest policy was necessary to assure diversity, among other concerns. *Id.* at ¶104. But that is the only mention of this issue in the *Attribution Order*.

[10] *See e.g.* Elizabeth A. Rathbun, *Radio Control: Top 25 Claim 19% of Stations*, BROADCASTING AND CABLE, Aug. 30, 1999, at 26-28.

For example, individuals holding attributable interests in one media outlet will no longer be proscribed, in all cases, from holding substantial nonattributable interests in other outlets in the same market, which the Commission acknowledges to be the thrust of the nonattributable equity interests policy. Under the Commission's new approach, the owner of an attributable share in one media outlet would be permitted, without review, to obtain a nonattributable share of up to thirty-two percent of another media outlet's total asset value. *See id.* at ¶36.

The new EDP regime does not even arguably cover other abandoned aspects of the cross-interest policy. The Commission acknowledges as much, *see id.* at ¶114, and hopes that internal conflict of interest rules and common law will somehow prevent damaging cross-interest problems from arising with key employees. This resembles what George Bernard Shaw said of remarriage: it is the triumph of hope over experience. Moreover, whatever validity this assurance may have for larger, publicly traded companies, it does absolutely nothing for the areas of the greatest potential abuse, especially smaller privately held or closely-held companies in small and medium sized markets.

Similarly, with respect to joint ventures, the Commission maintains that "*[m]any* joint ventures are already covered by the ownership/attribution rules, and they *may* also be covered to some extent by the EDP rule . . . . [T]he cross-interest policy as applied to joint ventures is *largely* subsumed . . . ." *Id.* at ¶115 (emphasis added). The Commission gives no apparent consideration to aspects of the joint venture policy *not* covered by rules left in place, other than to assert vaguely that such aspects must now be redundant and unnecessary.

Notably, the Commission does not specify what sort of conduct that might have been impermissible in the past is acceptable today. It has never been the case that compliance with some rules implies compliance with all of them, but the Commission fails to explain why it is no longer necessary to apply cross-interest scrutiny to abusive joint ventures which otherwise squeak through remaining ownership proscriptions.[11]

In sum, it is dishonest for the Commission to rely on attribution and ownership rules which it has relaxed or plans to relax in the near future. The net effect of the Commission's recent actions has been a decrease in protection of the public interest. This cannot be justified through remaining protections which the Commission has eviscerated.

C. The Desire for "Clarity" Cannot be Sacrificed to the Public Interest

The Commission places regulatory certainty and clarity among its top priorities in initiating the latest round of review of the cross-interest policy. *See Attribution Order* at ¶112. While UCC *et al.* understand the need for clear regulations which are easily understood by licensees, there is little ambiguity about most aspects of the cross-interest policy which the Commission chose to leave in place a decade ago.

The question begged under the new scheme is whether outrageous abuse of public trusteeship justifies some level of ambiguity. For example, does the public not need to be protected against a salesman and announcer for a radio station who is the major shareholder and a board member of another station in the same community? *See, e.g., Carolina Broadcasting Co.*, 25 RR 515 (1963). The only relevant difference which has arisen in the last 36 years is that the

[11] The Commission *has* considered this issue in the past. *See e.g. Macon Television Co.*, 8 RR 703 (1952) (noting that a joint venture between two radio stations "militates against the separate and independent operation of the stations" and consequently harms arms length competition)

salesman might now be responsible for six or eight stations, and the broadcast company he may control might now be operating just as many other stations.

It is quite true that cross-interest rules must be applied on an *ad hoc* basis. This requires some flexibility, but does not mean that policies must be hopelessly vague. The Commission has taken the easy path of scrapping the cross-interest policy altogether, without exploring how it might instead make allegedly ambiguous policies more clear. Although it would be impossible for any *ad hoc* policy to be as fully clear-cut as specific rules, the Commission's decision to jettison the cross-interest policy altogether simply ignores the need for review of transactions which otherwise satisfy the rules. The rationale for *ad hoc* application is that some transactions that are bad for the public will nonetheless satisfy the letter of other rules. Consequently, the Commission's public interest duty demands review of apparent collaborations between competitors in local markets. Key employee relationships, nonattributable equity interests in competitors, and joint associations by local licensees are not hard to understand.

III. THE COMMISSION SHOULD CLARIFY THAT LOCAL MARKETING AGREEMENTS ARE NO LONGER A LAWFUL MEANS TO ACHIEVE CONTROL OF ANOTHER STATION

In the *Attribution Order*, the Commission finally decided to attribute local marketing agreements (LMA) for the purposes of the ownership rules. However, the Commission failed to indicate expressly how far its regulation of LMAs went. The Commission should clarify that LMAs are no longer a lawful means by which to achieve control of another broadcast station.

We have long advocated that LMAs are an unlawful evasion of the broadcast ownership rules. *See* Comments of MAP *et al. Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, MM Docket No. 94-150 at 20 (Filed Feb. 7

1997).[12] To a certain extent, the Commission recognized this in its decision to attribute LMAs. *See Attribution Order* at ¶ 87 ("[W]e agree with most commenters, representing a variety of interests ranging from ABC to the public interest group MAP, that television LMAs . . . permit a degree of influence and control that warrants ownership attribution."); *See also Separate Statement of Chairman William Kennard, Attribution Order* at 99 ("And by making LMA's attributable, our rules will prevent the use of time brokerage agreements to circumvent our ownership limits.") In light of the acknowledged public interest concerns with LMAs and the fact that the relaxation of the broadcast ownership rules has removed much of the incentive for broadcasters to use LMAs to get around the broadcast ownership rules, the Commission should clarify that LMAs are no longer permissible.

A. LMAs were Never in the Public Interest and They are No Longer useful to Broadcasters in Any Sense.

LMAs were never in the public interest and they still are not. LMAs are an unlawful evasion of the ownership rules, abrogate broadcasters' public trustee obligations, effectively permit a transfer of control without Commission review in violation of section 310(d) of the Communications Act, and are an affront to both diversity and competition. *See* Comments of MAP, *et al. Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, MM Docket No. 94-150 at 20 (Filed Feb. 7 1997). Even in the instance where an LMA may have arguably assisted a struggling intra-market station, the agreement still frustrated the principles of diversity and competition. An intra-market LMA will always reduce

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[12] UCC *et al.* comprise almost all the groups represented by MAP *et al.* in the initial comments of this proceeding.

the voice count in that market by one, preventing an out-of-market buyer or a new entrant from adding diversity to that market. At bottom, an LMA is an "artifice" that raises serious questions concerning the responsibility and accountability of the actual licensee of a station. *See Separate Statement of William Kennard, Attribution Order* at 99. For the above public interest reasons, the Commission should discontinue LMAs permanently.

Moreover, the relaxation of the ownership rules should remove any incentives for broadcasters to use LMAs to evade the ownership rules. After years of openly using these questionable combinations to exercise *de facto* control over another intra-market licensee, certain broadcasters can now get what they wanted all along - officially sanctioned duopolies. With the passing of the duopoly rule, the LMA's *raison d'etre* has passed as well. Therefore, the Commission should prohibit licensees from entering into any new LMAs.

B. The Commission Should Clarify that LMAs are an Illegal Artifice of Control as of August 6, 1999.

The Commission should clarify that as of August 6, 1999 - the date on which the new rules were released - LMAs will no longer be permitted. From that date forward, all interested parties were on notice of the Commission's plan to phase out LMAs. Furthermore, the comprehensive grandfathering plan for existing LMAs set forth in the new television local ownership rules protects any equity interests stations may have in LMAs. *See Local Broadcast Ownership Order* at ¶142. [13]

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[13] LMAs that were entered into before November 5, 1996, may lawfully retain their LMA status conditioned upon a Commission review in 2004. *See Local Broadcast Ownership Order* at ¶ 146. Stations that entered into LMAs on or after November 5, 1996 have a grace period of two years to terminate attributable LMAs if they are in violation of the new rules. *Id.* at ¶ 142.

LMAs entered into after August 6, 1999 should also be prohibited for a very practical reason; it will enormously simplify the Commission's processing of transfer applications on duopoly day. In the recent Public Notice, the Commission sought comments on how to determine the processing order of transfer applications pursuant to the new ownership rules. *See Processing Order for Applications Filed Pursuant to the Commission's New Local Broadcast Ownership Rules, Public Notice,* FCC 99-240 (rel. Sept. 9, 1999) ("*Public Notice*"). Because the number of transfers in a market is dictated by the number of "voices" and because two stations party to an LMA are considered one voice, LMAs will play a major role in whatever method the Commission chooses to process the transfer applications. As we stated in our comments to the Public Notice, we strongly believe that LMAs should <u>not</u> be given any preferential treatment in any process the Commission adopts to transfer the licenses pursuant to the new rules. *See* Reply Comments of UCC *et al.*, FCC 99-240 at 7 (Filed Oct.12, 1999). The Commission should declare LMAs entered into since August 6, 1999 unlawful because some of these LMAs may have been entered into for the precise reason of evading any type of transfer process or preventing a competitor from obtaining a transfer.

For example, a DMA with nine independently owned television stations would presently have nine voices under the new rules. One transfer would be currently permissible in that DMA. However, if before November 16, 1999 - the effective date of the new rules - stations A and B of that DMA enter into an LMA, the DMA voice count would drop to eight. Because of the reduction in voices no transfers would be allowed in the DMA on duopoly day - November 16, 1999 - unless one of the waivers applies. To complicate matters, suppose the LMA between stations A and B gave A a right of first refusal. If station A decides to excercise this right, it will have the first opportunity to consolidate a duopoly in that market. Therefore, by executing an LMA before the effective date of the rules, station A could exclude the competition in the DMA from obtaining a transfer and acquire a duopoly with one simple arrangement. By eliminating LMAs as of August 6, 1999 the Commission will prevent this situation, and the dozens of others like it, from ever happening.

C. The Commission should Implement Strong and Comprehensive Filing Requirements for LMAs.

In the *Attribution Order*, the Commission set forth much needed filing requirements for inter-market and intra-market LMAs. A reporting mechanism for LMAs is an essential reform of the attribution rules. It is even more important if the Commission were to decide not to prohibit LMAs. Thus, it is imperative, under any circumstance, that the Commission develop a strong and comprehensive means by which to monitor LMAs. The Commission must structure a filing scheme that "allows meaningful review and monitoring of these arrangements by the Commission." *See DOJ Letter* at 22-23. However, the requirements adopted in the *Attribution Order* do not go far enough to secure these goals. For example, the rules leave the LMA'ing licensee to its own recognizance to determine whether an LMA is attributable and to file the attributable agreement with the Commission. *See Attribution Order* at ¶¶ 94-95.

The Commission can easily remedy these shortcomings. First, the Commission should require broadcasters to file <u>all</u> existing LMAs with the Commission. This would allow the Commission to determine the attribution status of an LMAs. Second, the Commission should then post the data on the Commission's web site, similar to the process the Commission successfully implemented with respect to the filing of FCC 398 Forms concerning licensee's children's programming obligations. *See* FCC, *Information on Children's Programming* (visited 10/16/99) <http://svartifoss.fcc.gov:8080/prod/kidvid/prod/kv_info.htm>. Posting the data on the Commission's web-site would allow the public and licensees to monitor what stations are doing in their respective DMAs. If a citizen or a licensee has reason to believe that a station has an LMA interest and the LMA interest is not filed on the Commission's web-site, then they can report it to the Commission. An open monitoring process would also facilitate the voice-counting process in which public interest advocates and licensees would need to engage in order to ascertain how many transfers are permissible per DMA.

In sum, considering the public interest problems with LMAs, the relaxation of the broadcast ownership rules, the comprehensive grandfathering relief for existing LMAs and the incentive for manipulation for parties to enter into LMAs after August 6, 1999, the Commission should clarify that as of August 6, 1999, LMAs can no longer be used to obtain control of another station.

IV. THE COMMISSION SHOULD CLARIFY THAT NON-GRANDFATHERED LMAs HAVE ONE YEAR TO COMPLY WITH THE NEW RULES OR TERMINATE

Under the *Attribution Order*, parties to non-grandfathered LMAs have one year from adoption of the order to comply with the new rules or terminate. *See Attribution Order* at ¶171. Under the *Local Broadcast Ownership Order*, parties to non-grandfathered LMAs have two years to do so. *See TV Local Ownership Order* at ¶142. The Commission should clarify this conflict stating that parties to non-grandfathered LMAs have one year to divest themselves of attributable interests or terminate.

CONCLUSION

UCC *et al.* urge the Commission to partially reconsider its decision regarding the attribution rules of broadcast interests and revise these rules to be consistent with the public interest. First, the Commission should restructure its attribution rules to accomplish what they purport to achieve: to identify any relationship that permits an entity to exert significant influence or control over the programming or management decisions of a licensee. Specifically, the Commission should address the holes left by the EDP rule and eliminate the single majority exemption. Second, the Commission should retain the cross-interest policy. Third, the Commission should prohibit licensees from entering into LMAs as of August 6, 1999. And finally, the Commission should clarify that non-grandfathered LMAs have one year to comply with the new rules or terminate.

Respectfully submitted,

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October 18, 1999

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